IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER, MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN, DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

Appeal from the Court of Appeals of the State of New York

BRIEF OF THE STATE OF NEW YORK *AMICUS CURIAE*

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Statement

This brief is filed by the State of New York by its Attorney General in support of the constitutionality of Chapter 360 of the Laws of 1949, popularly known as the Feinberg Law, which is the issue on this appeal.

The instant case was decided jointly in one opinion, upholding the constitutionality of the Feinberg Law, by the

Court of Appeals of the State of New York, together with *Thompson, et al. v. Wallin, et al.*, comprising the Board of Regents of the State of New York, and *L'Hommedieu, et al. v. Board of Regents of the State of New York.* The initial steps in administering the law are, by its provisions, committed to the Board of Regents of the State of New York.

The instant action was one of three lawsuits which were commenced at approximately the same time by different parties and under different types of procedure, all seeking the same result, that is, to have the law held unconstitutional. The law is designed to bar from employment in the public school system of the State persons who advocate, advise and teach the doctrine that the government of the United States or of any state or political subdivision thereof should be overthrown or overturned by force, violence or unlawful means.

One of the actions was brought by Robert Thompson, as Chairman of the Communist Party of the State of New York, and William Norman, as its Secretary, against the Board of Regents of the State. Another proceeding, the *L'Hommedieu* case, was brought by five persons who were employed at the time in the public school system of the City of New York and one then retired school teacher. Respondents in the *L'Hommedieu* case were the Board of Regents of the State of New York, as in the *Thompson* case, and in addition, the Commissioner of Education of the State of New York.

Special Term, Albany County, decided the *Thompson* case and the *L'Hommedieu* case together, granting the relief prayed for (196 N. Y. Misc. 686, November, 1949). The Appellate Division of the Supreme Court, Third Department, which heard the *Thompson* and *L'Hommedieu* appeals together, unanimously reversed Special Term on

March 8, 1950, declared the Feinberg Law to be in all respects constitutional and valid, and dismissed the complaint in the *Thompson* case and the petition in the *L'Hommedieu* case (276 App. Div. 463; 494).

The third, the instant action, was brought against the Board of Education of the City of New York—the State not being made a party—by a group which included a teachers' union, other unions, teachers, taxpayers, and others. Special Term held that only the taxpayers had a justiciable controversy, a statutory action under Section 51 of the New York General Municipal Law, which permits a taxpayer to sue to prevent "any illegal official act * * * or * * * waste or injury to * * * property, funds or estate of * * * [a] municipal corporation." The taxpayer plaintiffs were granted judgment on the pleadings (R. 2-4; 196 Misc. 873, December 1949, *sub nom. Lederman, et al.* v. *Board of Education of the City of New York*). The Appellate Division, Second Department, reversed Special Term and dismissed the complaint (R. 50; 276 App. Div. 527, March 27, 1950, *sub nom. Lederman, et al.* v. *Board of Education of the City of New York*).

The three cases were appealed to the New York Court of Appeals and were heard together by that Court. The Court of Appeals unanimously affirmed the Appellate Divisions on November 30, 1950. The one opinion embraced all three cases (R. 54; 301 N. Y. 476). The law has thus been upheld in the three lawsuits in which it has been attacked: —by the Court of Appeals, the highest Court of the State, and two Appellate Divisions of the Supreme Court of the State, the Appellate Division, Second Department, and the Appellate Division, Third Department.

An appeal was taken to this Court in the *Thompson* case in which the State Board of Regents were the appellees,

and jurisdiction was noted on June 4, 1951 (October Term, 1951, No. 13). The appeal was withdrawn, and dismissed on stipulation of counsel September 12, 1951.

The *L'Hommedieu* case was not docketed until September 10, 1951. (No. 312) and jurisdiction has not been noted as yet.

The Board of Regents has not concluded its hearings, having been restrained at the outset of the litigation from so doing and having refrained since the decision by the Appellate Division, awaiting the final outcome. Neither appellee nor any other board of education has taken any steps under the Feinberg Law.

Since the State is not a party in the instant case, it is participating in this appeal *amicus curiae* by permission.

Jurisdiction

Jurisdiction was noted in the instant case on June 4, 1951, as a companion case with the *Thompson* case.

THE PROVISIONS OF THE FEINBERG LAW AND THE STATUTES WHICH PRECEDED IT*

The Feinberg Law is not a completely new kind of law in New York State. Its purpose and policy have for many years been part of the statutory qualifications for teachers and persons in other public employment in this State.

Statutes Prior to the Feinberg Law

Since 1917, the Education Law has provided, in Section 3021, for the removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.

* The Feinberg Law and other relevant statutes are printed in full as an appendix to this brief.

Since 1939, the Civil Service Law, in Section 12-a, which appellants concede to be valid (Br. pp. 5-6, 9), has barred the appointment or retention of any person in the service of the State or of any civil division or city, including any person serving in the public school system or in any other State educational institution, who by word of mouth or writing advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or organizes or helps to organize or becomes a member of any society or group of persons which so teaches or advocates.

These statutes, unattacked since their enactment, are in fact ameliorated by the Feinberg Law.

New provisions in the Feinberg Law have the effect of giving added protection to persons whose appointment or retention in the state public school system might be in question under Section 12-a.

First, under the Feinberg Law the Board of Regents must, upon notice, conduct a hearing and thereafter list the organizations found as the result of such hearing, to advocate the overthrow of the government by force, violence or other unlawful means. Second, membership in such organization is made *prima facie* evidence only, of disqualification for appointment to or retention in any position in the public school system.

The Provisions of the Feinberg Law Notice and Hearing are Fully Provided

The operative provisions of the Feinberg Law (§ 3 of Chapter 360) constitute an amendment of the Education Law adding a new Section 3022 to that law. Subdivision 2 is the vital new provision, subdivision 1 being merely a

direction to the Board of Regents to adopt rules and regulations for the disqualification or removal of teachers and others in the public school system who violate Section 3021 of the Education Law, or who are ineligible for appointment or retention under Section 12-a of the Civil Service Law—the two laws so long on the books, unattacked.

The new provision, subdivision 2, does just this:— It directs the Board of Regents "after inquiry, and after such notice and hearing as may be appropriate," to make a listing of organizations "which it finds to be subversive in that they advocate" the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means.

The Board of Regents is further directed by that subdivision to provide in rules and regulations that membership in any organization included in the listing made by it, shall constitute "*prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state" (emphasis supplied). The teacher has a hearing at which this *prima facie* evidence is introduced and may be refuted (Court of Appeals opinion, 301 N. Y. at p. 494; R. 67).

The Preamble of the Feinberg Law.

Section 3 of Chapter 360 heretofore set forth is the actual addition by the Feinberg Law to the Education Law, as Section 3022 thereof. Section 2 of Chapter 360 is the provision renumbering former sections of the Education Law to permit a new Section 3022.

There is a Section 1 in Chapter 360 which is the preamble to the law setting forth the reasons why the Legislature enacted the law. It contains the finding and declaration

of the Legislature as to the existence of the evil which the law is designed to meet. In McKinney's Education Law it appears as a footnote under Section 3022 and is entitled "Declaration of policy."

It contains no directive to the Board of Regents or to any officer or official body. It is not a part of the provisions of the law to be administered or put into effect (Op. of Court of Appeals, 301 N. Y. at p. 493; R. 66).

Statutory Provisions for Review of Determinations of the Board of Regents and Boards of Education

Full and complete court review of any determination of the Board of Regents listing an organization, and of any determination of a board of education finding a teacher disqualified under the Feinberg Law, is available.

An organization listed by the Board of Regents, after hearing upon notice, as advocating the overthrow of the government by force, violence, or other unlawful means, has the remedy provided in New York State by Article 78 of the Civil Practice Act (Op. of Court of Appeals, 301 N. Y. at p. 493; R. 66). This is a statute providing a right of review from the determination of a body or officer "which involves an exercise of judgment or discretion" (Civil Practice Act § 1284). It is a general statute which obtains where no other remedy is specifically provided. (See *Matter of New York Edison Co.* v. *Maltbie*, 271 N. Y. 103, 111-112.)

A teacher found disqualified pursuant to the Feinberg Law by a board of education has an election of remedies—several methods of appeal or review from which to choose:

(1) Civil Service Law § 12-a, subd. d, specifically provides the following review procedure:

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

(2) Education Law § 310 gives the teacher the right of appeal or petition to the Commissioner of Education.

(3) Education Law § 2573, subd. 5, accords the teacher an alternative right of review in accordance with the provisions of Article 78 of the Civil Practice Act, referred to above.

In view of some of the arguments appellants make, we might, having set forth the provisions themselves, note what the law does not provide, what it is not, what it does not do.

1. The Feinberg Law does not disqualify a teacher for membership in the Communist Party or in any other organization; it merely makes *prima facie* evidence of disqualification to be a teacher, membership in an organization which, after notice and hearing, the Board of Regents ascertains to advocate the overthrow of our government by force, violence or other unlawful means. This *prima facie* evidence of disqualification the teacher has full and complete opportunity to rebut.

2. The Feinberg Law does not affect the right of association nor direct that a teacher suffer any disqualification for mere association. The disqualification

to be a teacher is for individual action, membership in an organization, after it has been found to advocate the overthrow of the government by force, being made merely *prima facie* evidence of disqualification.

3. The Feinberg Law does not affect anyone's privilege to hold, speak or publish any views, beliefs or opinions, nor the privilege of assembly, nor the privilege of petitioning the government, nor the privilege of exercising any political rights.

4. The Feinberg Law does not restrict anyone's right to join and be a member of the Communist Party or of any other organizations, even one which advocates the overthrow of the government by force.*

5. The Feinberg Law does not direct or permit the Board of Regents to find any organization to be "subversive" merely. It defines and specifies in Section 2 that it directs and permits the listing of those organizations which are found "to be subversive *in that* they advocate" the overthrow of the government by force, violence or other unlawful means, and those organizations only (emphasis supplied).

The law thus does not disqualify a teacher for being "subversive." The act of subversion for which he may be disqualified is defined and made specific in the law.

The Question Presented

The one issue before this Court upon this appeal is whether the Constitution prohibits a state from disqualifying for employment as teachers of children in its public

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* We have, since the inception of the Feinberg Law litigations in 1949, shown *seriatim* that the law has nothing to do and has no effect whatever on rights which the plaintiffs in the actions contended it violated. It was accordingly gratifying to see Mr. Justice Jackson's reply to the claim in the *American Communications* case that it involved civil rights, freedom of speech and the press (339 U. S. at p. 134).

schools, persons found to advocate the overthrow of our government by force, violence or other unlawful means, and whether it is unconstitutional for a state to provide that membership in an organization which, it has been ascertained, after appropriate notice and hearing, advocates the overthrow of our government by force, is *prima facie* evidence of disqualification for appointment or retention as teachers in the public schools.

This, and this alone, is the issue.

The issue is not freedom of speech.

The issue is not freedom of thought.

The issue is not freedom of assembly.

The issue is not academic freedom (not of teachers and certainly not of students [Appellants' Br. p. 7]).

None of these freedoms is foreclosed by the Feinberg Law.

The issue is the narrow one presented by the narrowly drawn Feinberg Law, which makes one activity—membership in an organization which is found, after notice and hearing, to advocate the overthrow of our government by force—*prima facie* a disqualification to teach in the public schools of this State.

"To attack the straw man of 'thought control'" (*American Communications Association* v. *Douds*, 339 U. S. 382, at p. 408) by posing the case as being one turning upon that issue, is to construct an issue that does not exist and with it to attempt to block out the real issue. It is "to ignore the fact that the sole effect of the statute upon one who" is found disqualified under it is the loss of position (id.).

To be borne in mind is the fact that there is not a constitutionally guaranteed right to public employment *(Garner* v. *Los Angeles Board,* 341 U. S. 716, 724) and thus no constitutionally guaranteed right to be a teacher in a public school system. Nor is there a constitutional right to advocate the overthrow of the government by force and violence *(Dennis* v. *United States,* 341 U. S. 494). And, we might preliminarily also recall that this Court is, of course, not concerned with the wisdom of the Feinberg Law, with the question of whether it is a good thing or not to adopt such a law. That was a consideration solely for the Legislature and not for the courts (*infra,* p. 27).

Summary of Argument

I. A major number of appellants' arguments are directed to matters of construction of the statute and are thus foreclosed by the construction placed upon it by the highest court of the State of New York which has applied the statute so as to protect completely every constitutional right and guarantee.

II. The Feinberg Law does not unconstitutionally infringe upon freedom of speech and assembly. It makes no restriction that this Court has not held to be constitutionally proper for our government's essential power of self-preservation.

III. Under the Constitution assurance of "Fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it" *(Garner* v. *Los Angeles Board,* 341 U. S. 716), as teachers, may be required. "The Constitution does not guarantee public employment" (Id.),

IV. Appellants' conjectures as to problems of defense are not a basis for attack on the constitutionality of the statute.

V. As to appellants' argument that the law is vague.

VI. Miscellaneous arguments which have been made in these litigations.

ARGUMENT

I.

A major number of appellants' arguments are directed to matters of construction of the statute and are thus foreclosed by the construction placed upon it by the highest court of the State of New York which has applied the statute so as to protect completely every constitutional right and guarantee.

"Of course," the construction of the statute by the highest court of the State of its enactment "is binding on this Court" (*Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, 432).

The Court of Appeals of New York has construed the Feinberg Law

1. As providing in "subdivision 2 of the statute" that "no organization may be listed" by the Board of Regents "until 'after inquiry, and after such notice and hearing as may be appropriate'" (301 N. Y. at p. 494; also p. 493; R. 67; also R. 66).

2. As affording the organization adequate court review of any such listing, under general statutory provisions of New York, i. e., Article 78 of the New York Civil Practice Act (301 N. Y. at p. 493; R. 66).

3. As making the holding of membership "knowingly" in an organization named upon any listing for which subdivision 2 makes provision, as of the time when one "seeks to establish or retain employment in the State public school system," i. e., present, not past membership, the *prima facie* evidence of disqualification (301 N. Y. at p. 494; R. 67).

4. As importing a hearing, in the phrase "*prima facie* evidence of disqualification," at which one who seeks appointment or retention in a public school position shall be afforded an opportunity to present evidence contrary thereto (301 N. Y. at p. 494; R. 67).

5. As providing, in the *prima facie* evidence of disqualification, a presumption which remains only until substantial evidence to the contrary is offered and disappears when that is offered, unless met by further proof (301 N. Y. at p. 494; R. 67).

6. As placing—under Section 12-a, subdivision d, of the Civil Service Law—"once such contrary evidence has been received," upon the official who made the order "the burden of sustaining" its validity "by a fair preponderance of the evidence" (301 N. Y. at p. 494; R. 67).

7. As affording—under Section 12-a, subdivision d, of the Civil Service Law—the right of review to any person aggrieved by an order of ineligibility (301 N. Y. at p. 494; R. 67).

8. As giving rise to "no question of procedural due process" (301 N. Y. at p. 494; R. 67).

9. As not lacking in clarity and as not being vague (301 N. Y. at pp. 493-4; R. 66).

10. As applying to those organizations only which advocate "the overthrow of the government by violence or unlawful means" (301 N. Y. at p. 488; R. 60-61).

11. As inflicting "no punishment" "upon any organization which the Board of Regents—after hearing—

shall find advocates the overthrow of government by force or unlawful means" (301 N. Y. at p. 493; R. 66).

12. As implementing a provision of the Civil Service Law, Section 12-a (which was in existence for ten years when the Feinberg Law was enacted)—which prescribes statutory standards governing the conduct of teachers and other employees in the public school system and persons generally employed in the State civil service (301 N. Y. at pp. 484-5; 489; R. 56, 61), and whose constitutional validity appellants concede (Br. pp. 5-6, 9).

The Court of Appeals also held (301 N. Y. at p. 494; R. 67) that it found "rational relation between the legislative findings which prompted the enactment of the Feinberg Law and the measures prescribed therein to safeguard the public school system of the State."

No argument is being made in this Court, no contention as to the meaning or effect of the provisions of the law, which was not made in the State courts, and whether mentioned in the State courts' opinions or not (*L'Hommedieu* v. *Board of Regents*, 276 App. Div. at p. 510), they were, of course, considered and the State courts, construing the Feinberg Law, its purpose, meaning and effect, must be presumed to have found such contentions without merit.

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, where a state statute was attacked as violating the First and Fourteenth Amendments of the Constitution, this Court, in an opinion by Mr. Justice Murphy in which all concurred, said (p. 572): "The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire." Quoting the state court's declaration of the

purpose of the statute, its language and effect, this Court went on to say (pp. 573-4):

> "We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to defing and punish specific conduct lying within the domain of state power * * * * * * This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. * * *
>
> "Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech."

Before continuing to other points of the "Argument," some statements in appellants' brief which are contrary to the facts should be noted:

Page 3— That disqualification is because of membership in an organization "alleged to be subversive."

The Fact: The provision of the law is that an organization must be *established*, after "notice and hearing," to be subversive *in that it advocates* the overthrow of the government by force before it may be listed.

Pages 6, 8—That the regulations command severance of relations with a listed organization within ten days on pain of loss of position.

The Fact: The effect of the regulation (Regulation No. 2) is that it is not even *prima facie* evidence of disqualification if membership in a listed organization is severed within ten days

of the listing; and continued membership is but *prima facie* evidence of disqualification A teacher has a hearing at which he has opportunity to rebut this *prima facie* evidence. The applicable provision of the regulation (R. 23-4) is: "Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification * * *."

Page 8— That the *Garner* case is distinguishable because the California charter required awareness of the character of the organization; that this Court interpolated the conception *knowingly* in the oath.

The Fact: The Feinberg Law, and it was so interpreted by the Court of Appeals, "makes it clear that" the disqualification is for "knowingly" holding membership in an organization listed (301 N. Y. at p. 494; R. 67).

Page 10— That the law makes no distinction between past and present membership.

The Fact: The Feinberg Law, and it was so interpreted by the Court of Appeals, "makes it clear that" it is membership at the time when one "seeks to establish or retain employment in the State public school system" that operates as a *prima facie* disqualification (301 N. Y. at p. 494; R. 67).

We might also here make a general observation concerning appellants' argument. It appears to be chiefly an ex-

pression of dislike of the law as restrictive, and an effort at *in terrorem* argument, so to speak, as to freedom of speech and assembly. Their legal objections are indefinite and their statements frequently inconsistent. Ultimately they indicate that there is no issue as to the purpose of the law but that Section 12-a of the Civil Service Law would "adequately take care of such persons" (Br. p. 9). They accept as valid the provision of Section 12-a of the Civil Service Law which—in their words—"disqualifies employees who belong to organizations" which advocate the overthrow of the government by force. This they grant is analogous to the charter amendment held valid in the *Garner* case (Br. pp. 5-6). They finally come down to contending that "the issue" is "whether lists should be promulgated of organizations which an administrative agency, without particular competence in that field has declared advocate the overthrow of the government by force" (Br. p. 9). We submit that that question presents no issue of constitutionality before this Court. Specifically, to what official or agency of the State, the Legislature might entrust the promulgation of the list of organizations is, of course, a State matter (*Neblett* v. *Carpenter*, 305 U. S. 297, 300).

II

The Feinberg Law does not unconstitutionally infringe upon freedom of speech and assembly. It makes no restriction that this Court has not held to be constitutionally proper for our Government's essential power of self-preservation.

This Court has recently reaffirmed the principle which it has ever maintained; that there must be accommodation of the individual liberties and freedom guaranteed by the Constitution to the unexpendable power of the government of

these United States, under which those liberties and freedom are possible, in order to preserve its existence against those who directly and immediately, or indirectly and by slow, termitic process, would destroy it.

Chief Justice Vinson's opinion in *Dennis* v. *United States* stated that principle thus (341 U. S. at pp. 501, 503, 508):

> "We reject any principle of governmental helplessness in the face of preparation for revolution, which principle carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. * * * An analysis of the leading cases in this Court which have involved direct limitations on speech * * * will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.
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> * * *
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> "* * * Nothing is more certain in modern society than the principle that there are no absolutes, * * *. * * * To those who would paralyze our Government in the face of impending threat * * * we must reply that all concepts are relative."

Mr. Justice Frankfurter's opinion in that case expressed the same thought in different language (at pp. 519, 521).

Appellants urge (Br. p. 5) that "This Court must look at the objectives of the challenged legislation and its impact on freedom." Exactly so. It was by "striking a balance" (Mr. Justice Jackson in *Dennis* v. *United States*, *supra*, at p. 561) between individual unrestrained freedom and the protection of the freedom of all, which is represented in the objectives of the statute here attacked, and to preserve the existence of our government which provides that freedom, that this Court sustained the constitutionality of the

Smith Act, and held that the latter must prevail. Precisely by a like striking of a balance between these two interests, did this Court in *American Communications Association* v. *Douds* sustain the constitutionality of the non-Communist oath provision of the Taft-Hartley Law, saying (339 U. S. at pp. 394, 398, 399-400):

> "Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts. * * *
>
> "* * * the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. * * * We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.' *Cox* v. *New Hampshire, supra,* at 574.
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> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. * * *.
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> "* * * legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights. *Reynolds* v. *United States, supra; Prince* v. *Massachusetts, supra; Cox* v. *New Hampshire, supra; Giboney* v. *Empire Storage Co., supra.*"

In that case the restriction affected union leaders. This Court's opinion weighed the public against the individual interest, and deciding in favor of the paramount public interest, said (at p. 400):

> "In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership."

The "objectives" of the Feinberg Law at which appellants want this Court to look, "the obvious purpose of the statute" (*Dennis* v. *United States*, *supra*, at p. 501) "is to protect existing Government" (id.) by preventing those who would "change [it] by violence, revolution and terrorism," (id.) from being the teachers of our children.

To avoid overlapping, the particular menace of the employment of persons of such persuasion as teachers will be left to the next point (III), where will be discussed the constitutional power of the State to adopt a law such as this governing its employees.

We recall here Mr. Justice Holmes' injunction in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110-111:

> "* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by

> the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power.
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> * * * * *
>
> "It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The absence of anything in the Feinberg Law restricting freedom of speech and assembly has already been pointed out *supra*. "In the light of present-day actualities" (*American Communications Association* v. *Douds*, 339 U. S. *supra*, at p. 435), the problem which the New York Legislature was obliged to face "realistically" (*Dennis* v. *United States*, *supra*, at p. 569) was that of invasion of the public school system of the state by an evil force which, tragically, has been found to have also invaded other facets of American life (id. p. 564): the infiltration and penetration into the public school system of part of the network which seeks to accomplish the overthrow of our government by force and violence, when the time is ripe, by using positions in strategic places to subtly disseminate its doctrines and build and extend its fifth column by gaining adherents to its cause (*Dennis* v. *United States*, *supra*, at pp. 501-11, 534-35, 567, 577; *American Communications Association* v. *Douds*, *supra*, at pp. 388-9, 429-433).

If to cope with that acute threat, the Feinberg Law does have an "impact upon freedom" of the individual, the rulings of this Court, here cited, are direct, specific authority that it is constitutionally permissible and that the law is entirely valid.

III

Under the Constitution assurance of "fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it" (*Garner v. Los Angeles Board*, 341 U. S. 716), as teachers, may be required.

"The Constitution does not guarantee public employment" (id.).

The Feinberg Law deals with but one subject; does just one thing (cf. *American Communications Association* v. *Douds*, 339 U. S. at p. 404): It provides a disqualification for public employment and a very special kind of public employment, that of teachers of our children, to whom (in the words of the preamble to the law) "the children look for guidance, authority and leadership."

This Court's decisions in the *Gerende* case (341 U. S. 56) and the *Garner* case (341 U. S. 716) upheld the constitutionality of laws "establishing an employment qualification of loyalty to the State and the United States" (*Garner* v. *Los Angeles Board*, 341 U. S. at p. 721, also p. 730).

Appellants (Br. Point II) argue against the provision in the Feinberg Law, that membership in a listed organization shall be *prima facie* evidence of disqualification, upon the ground that such membership has no rational connection with fitness to teach.

The *Gerende*, *Garner* and *American Communications* cases rest upon the premise that it does.

"It can hardly be doubted," said Chief Justice Vinson in the *American Communications* case (339 U. S. at pp.

391-392), "that voluntary affiliations* and beliefs justify * * * [an] inference" "concerning future conduct," and "provide rational ground for the legislative judgment that those persons proscribed * * * would be subject to 'tempting opportunities' to commit acts deemed harmful [to the national economy]." He cited *Board of Governors* v. *Agnew*, 329 U. S. 441, and applied the reasoning which led to the conclusion in that case, viz: "Because of their business connections, carrying as they do certain loyalties, interests and disciplines, those persons were thought to pose a *continuing threat* of participation in the harmful activities described above" (emphasis supplied).

Where the subject is not union leaders (involved in the *American Communications* case), but teachers, the threat is not merely to the economy. It is to that on which the economy rests. The threat lies in their influence upon the children who will soon have the power to shape the destiny and form of our government. Chief Justice Vinson's words in pointing out why it is essential that the "threat," the "continuing danger" (at p. 393) be removed are even more pertinent to the task of dealing with the threat of teachers who advocate the overthrow of the government by force (p. 406):

> "* * * the practical difficulties which would be encountered in detecting illegal activities of this kind are factors which are persuasive that * * * [the law making body] should not be powerless to remove the threat, not limited to punishing the act."

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* The act of affiliation is an "overt act" (id. p. 411). The greater danger in united and joint action is recognized by this Court. And by outstanding liberals. As the late Harold J. Laski wrote:

> "It is clear that no state charged with the maintenance of social order can admit of an unlimited right to freedom of association; for that would be to tolerate the existence of bodies actively engaged in an effort to seek its own overthrow by violence" ("Freedom of Association," Encyclopedia of the Social Sciences, Vol. VI, p. 449).

And see page 405; setting forth the holding in *United Public Workers* v. *Mitchell*, 330 U. S. 75. See also *Garner* v. *Los Angeles Board*, *supra*, at pp. 720, 725.

The Feinberg Law, "narrowly drawn," of "limited scope" (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 573; *Cox* v. *New Hampshire*, 312 U. S. 569, 572), with all procedural protection assured (*supra* I), is surely least questionable of all the laws which "the context of our time." (*Garner* v. *Los Angeles Board*, 341 U. S. at p. 725) has compelled the Congress and state legislatures to adopt for the preservation of our country, and which this Court has upheld.

The *Gerende* case unanimously affirmed the decision of the Maryland Court of Appeals upholding the validity of the provision of the Ober Law, requiring candidates for public office in that state in order to obtain a place on the ballot, to make oath that he is not engaged in one way or another in the attempt to overthrow the government by force or violence and that he is not knowingly a member of an organization engaged in such an attempt. This Court pointed out that it had the assurance of the Attorney General of Maryland, based upon the state court's construction of the law, that he would advise the proper authorities to accept an oath in such terms.

The *Garner* case also upheld an oath and affidavit statute and ordinance.

The *American Communications* case, still another oath case, involved a statute which affects something less than public employment—union leaders—but which this Court found justified the requirement of the oath in the public interest because of the influence of union leaders on the public economy.

The Feinberg Law is not an oath statute. It does not require an oath of all who seek to obtain or retain a position in the public school system of the State. It provides for the existence of *prima facie* evidence of advocacy of the overthrow of the government by force or violence in the individual's membership in an organization found after notice and hearing to so advocate. And it provides for a hearing at which such *prima facie* evidence may be rebutted.

The Particular Need for Assurance of Fidelity of Teachers

Teachers would be the first to affirm and the last to decry the extent of their influence upon the children who come under their instruction. Prose and verse have sung of it and courts have ruled upon that premise:

> "Teachers are supposed not only to impart instruction in the classroom but by their example to teach the students. * * * Academic freedom cannot authorize a teacher to teach that murder or *treason* are good. * * * [the teacher's] very presence as a teacher will cause the students to look up to him, seek to know more about him, and the more he is able to charm them and impress them with his personal presence, the more potent will grow his influence in all spheres of their lives, causing the students in many instances to strive to emulate him in every respect." *Matter of Kay* v. *Board of Higher Education, New York City,* 173 Misc. 943, 947, 951, aff'd, 259 App. Div. 879; leave to app. den. 284 N. Y. 819 (emphasis supplied).

To accord to children the benefit of the influence of teachers and their teaching is the whole purpose of formal education, the purpose of the extensive system of public schools in this country. In the teacher's power rests, not as in the case of union leaders (involved in the *American Communications* case), the coloring or diverting of opinions of adults whose views, attitudes and beliefs have already

been formed, but the seeding of the first ideas which make enduring impression upon virgin minds, and the shaping of the basic beliefs of today's children, who will be the ones to determine the destiny of our nation.

Apart from teaching at home—and there is division of opinion (like it or not) as to which has the greater impact—we learn of country, of our government, of our history, from our teachers. How would these be taught by a teacher who advocates that the government should be overthrown by force? Grant that a teacher so advocating would be cautious enough not to make statements to that effect outright, we know that it is not necessary to project a thought or attitude by direct statements. There are indirect, subtle, insinuating ways; by what is left unsaid as well as by what is said.

To turn from the natural feelings of loyalty to one's country, to advocate that one's government should be overthrown by force, requires great depth of belief in that doctrine and profound desire to gain adherents to it. It is to stamp the teacher a mechanical thing to say that a belief so strong will not affect his approach to the subjects he teaches, will not affect his teachings.

Beyond that,—this Court has had told in records before it in recent years, the dedicated devotion to their cause of adherents to such doctrines, their clandestine methods of dissemination of these doctrines, their purpose and success in infiltrating into strategic posts where they may promote their cause, the requirement that in every facet of life that promotion of their cause is the one prevailing purpose, the fact that their stressed objective is the recruiting of followers and adherents to the cause (*Dennis* v. *United States*, *supra*, at pp. 498, 510-11, 547, 564-5, 567, 577; *American Communications Association* v. *Douds*, *supra*, at pp. 431-433, 424-431).

What more fertile field for such recruiting than in the schools? The hope of those who advocate that our government should be overthrown by force is in the coming generation and in the teachers who share their views; in the power of teachers to influence the coming generation. The fact that their call is not to uprising at this time but in the future, bespeaks the truth of what we say here.

Like the Hitler technique, the Communist technique is to concentrate particularly on the capture of the mind of youth and thus insure the ultimate success of their cause, if not in this generation, then in the next one. The Berlin Festival of Youth during this last summer set before the world the spectacle of the purposefulness of this goal and of the success it has already achieved. May we not provide that the missionaries for such causes shall not be teachers of our children in our public schools, shall not be the "keepers of that arsenal"? (Cf. *American Communications Association* v. *Douds, supra*, at p. 412.) That is the "rational basis" for the presumption provided in the Feinberg Law.

The desirability and necessity for the Feinberg Law thus should be beyond doubt. Appellants, to be sure, do not think it a good law (Br. p. 7).

But, as this Court has said and repeated, the necessity for or desirability of a law is not a question for the courts, but for the legislative body which enacted it (*Dennis* v. *United States, supra*, at pp. 525, 539-40, 548; *Garner* v. *Los Angeles Board, supra*, at pp. 400-1; *United Public Workers* v. *Mitchell, supra*, 330 U. S. at pp. 95, 102).

Appellants urge that Section 12-a of the New York Civil Service Law "adequately takes care of" (Br. p. 9) the problem of eliminating as teachers persons whom the Fein-

berg Law is designed to reach. Whether or not a particular statute is needed to deal with the situation in the light of existing statutes is likewise for the Legislature, and its judgment as to that too, courts will not disturb (*Dunne v. United States*, 138 F. (2d) 137, 143; cert. den. 320 U. S. 790; rehearing den. 320 U. S. 814; second petition for rehearing den. 320 U. S. 815).

Appellants have injected into their brief (p. 7) references to a miscellany of lay opinion as to current campus attitudes in the realm of expression of ideas; the attitude of students, indeed, whom of course the Feinberg Law does not concern (cf. *Dennis* v. *United States*, 341 U. S. at p. 502). Why such attitudes have developed, if they have, appellants do not say. They do not attribute them obviously to the Feinberg Law. As we have said and shown, there is not a thing in the Feinberg Law which touches academic freedom, which stops a teacher from discussing anything. "The very language" of the law "negates the interpretation" appellants place upon it. "It is directed at advocacy, not discussion" (*Dennis* v. *United States*, *supra*, at p. 502; cf. p. 501). By all means children should be informed as to what ideas are abroad, what are the systems of government under which other peoples of the world live; let them learn the virtues of those systems as well as their failings. Let them learn of the shortcomings of our government.* What the Feinberg Law aims at is that the teachers who give this information shall be persons who do not advocate the overthrow of our own government by force or violence.

In the light of the matter which appears on page 7 of appellants' brief, we might note that teachers themselves, the most interested and vigilantly jealous guardians of

* See R. 27-8, Commissioner of Education's Memorandum on Administration of Regents' Rules.

"academic freedom," have found that eliminating communist penetration into the teaching field is not only compatible with that freedom, but essential to it. The National Education Association of the United States,* at its 88th annual Representative Assembly in July 1950, adopted the following amendment to its bylaws:

> "* * * no person shall be admitted or continued in membership in the NEA who advocates or who is a member of the Communist Party of the United States or of any organization that advocates changing the form of government of the United States by any means not provided for in the Constitution of the United States."

The report, to the same Assembly, by the Educational Policies Commission ** accurately clarifies the issue:

> "We reaffirm with emphasis that membership in the Communist Party and in the teaching profession are irreconcilable. Such membership involves adherence to doctrines and disciplines completely inconsistent with the principles of freedom on which American education depends."

The program of the Educational Policies Commission presented by its Chairman, Dr. John K. Norton, Professor of Education, Teachers College, Columbia University, to the Assembly in July 1950 of the National Education Association of the United States, declared:

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* The National Education Association of the United States is a national organization of teachers, numbering about 450,000 members and an affiliated membership of about 900,000.

** "The Educational Policies Commission was established jointly by the National Education Association and the American Association of School Administrators. In addition to representing these organizations, it also includes a representative from the Departments of Classroom Teachers, of Higher Education, of Elementary School Principals, and of Secondary School Principals" (as described in the report of the Commission to the July, 1950 Representative Assembly of the National Education Association).

"At our convention in Boston a year ago, the Commission proposed that membership in the Communist party and in the teaching profession were not reconcilable. * * * this proposal * * * was officially and overwhelmingly approved by action of the Resolutions Committee and the Representative Assembly of the National Education Association.

"Time is proving that this is one of the soundest and wisest positions ever taken at a convention of the National Education Association.

"Even more clearly than a year ago we see that the question in this whole matter is not one of civil rights.

"Rather, the issue is the position of our profession as to the proper qualifications of its members.

* * *

"The issue, therefore, is not—Do Communists have legal rights?

* * *

"Rather, the question is—Do persons who have pledged themselves to the objectives and the tactics of the Communist party have the qualifications for teaching which teachers are willing to accept? * * *

"Also, the past year has made clearer the fallacy of the 'guilt by association' argument used by those who would permit members of the Communist party to teach our children and youth.

"The fallacy in this argument is that membership in the Communist party is a radically different commitment than is membership in a free party in a free society.

"To be a Republican or a Democrat does not require acceptance of iron discipline and unflagging obedience in executing the orders of party leaders. * * *

"The Communist party member does accept these things and more. He becomes the agent of the party.

"In short, the Communist party member does far more than associate himself with a party as the term is understood in a free society. He makes a dedicated commitment to accept the discipline, both in thought and action, laid down by a little group of cynical and unscrupulous men, * * * espousing ideals and methods which are the antithesis of Democracy, * * *

> "To join such a movement is more than association. It is active cooperation, with moral degradation thrown in to boot!"

Demonstrating the currency of the problem in the eyes of teachers themselves, on December 11, 1951 the New York State Association of Secondary School Principals and on December 3, 1951, the New York State Association of Elementary School Principals each adopted resolutions at their annual conventions in Syracuse, N. Y. for continuance of their efforts to prevent employment of teachers advocating "ideologies such as Communism" (The New York Times, December 12, 1951; Syracuse Post Standard, December 3 and 4, 1951).

An eminent educator, Dr. Sidney Hook, Chairman of the Philosophy and Psychology Division of New York University's Graduate School, rests the disqualification of "the Communist Party teacher" upon "his declaration of intention, as evidenced by official statements of his party, to practice educational fraud," with neither academic freedom nor civil rights entering into the issue. Says Dr. Hook:

> "An individual joins an organization which explicitly instructs him that his duty is to sabotage the purposes of the institution in which he works and which provides him with his livelihood. Is it necessary to apprehend him in the act of carrying out these instructions in order to forestall the sabotage? Does not his voluntary and continuous act of membership in such an organization constitute *prima facie* evidence of unfitness?"*

The perfect method to leave the loyal American teacher free to discuss any doctrines and to state any opinions, without fear of irresponsible attack upon him, is to eliminate the disloyal teacher by procedure such as is provided in the Feinberg Law.

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* The New York Times Magazine, July 9, 1950, p. 39.

IV

Appellants' conjectures as to problems of defense are not a basis for attack on the constitutionality of the statute.

Appellants, at pages 10-11 of their brief, envisage problems of defense that would confront a teacher upon a hearing before a board of education.

First should be noted that there is no foundation for some statements appellants make in this connection. One such statement is that the hearings before the Board of Regents would be "presumably secret" (Br. p. 11). The answer is that the hearings would be public, of course. The one hearing which the Regents held before they were stayed by these litigations was public.

Appellants also say that a teacher would have no way of knowing what considerations led the Regents to list an organization (Br. p. 11). Certainly a teacher would know. The minutes of the hearing would be a public record and available.

Moreover, anticipation of problems of proof is not a basis for an attack upon the constitutionality of the statute itself, which is all that is before the Court at this time:

> "Impossibility of proof may not be assumed. • • • Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 208-210. *Petitioner's contention as to impossibility of proof is premature.*" (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337 at pp. 352-3; see also pp. 345-6, 356-7; emphasis supplied.)

And see *Federation of Labor* v. *McAdory*, 325 U. S. 450, 469.

Only the statute as written is to be considered at this time, not any problems of proof, not any questions of ad-

ministration of the law, not the regulations (cases *supra* and *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 108; *United States* v. *Petrillo*, 332 U. S. 1, 11-12; *Minnesota* v. *Probate Court*, 309 U. S. 270, 275, 277).

Due process is scrupulously provided in the Feinberg Law in notice, hearing and judicial review. No element of due process is denied in the law. That is all with which the Court at this time will concern itself (cases *supra*).

V

As to appellants' argument that the law is vague.

Appellants, although they entitle their Point III in general terms, actually are arguing only that Section 3021 is vague and conclude their point (Br. Point III, p. 14) by asking that Section 3021 and the new law, "insofar as it rests on this older one," should be declared unconstitutional. That, this Court of course could do if there were a basis for it. Subdivision 1 of § 3022 of the law implements § 3021, by directing the Board of Regents to adopt rules and regulations for its enforcement. That is the only reference in the Feinberg Law to § 3021. The crux of the Feinberg Law is subdivision 2 of Section 3022, which provides for the listing of an organization by the Board of Regents, after notice and hearing, for advocacy of the overthrow of the government by force, and declares that membership in an organization so listed shall be *prima facie* evidence of disqualification for office or position in the public schools. Section 3021 could, as appellants ask, be disapproved, if grounds therefor existed, and the balance of the Feinberg Law upheld (cf. *Dennis* v. *United States*, *supra*, at p. 542). However, the argument of vagueness was made to the State courts which, construing the statute, found "no lack of clarity in the operative clause," i. e., subdivision 2 of Section 3022 (301 N. Y. at p. 493; R. 66).

It is to be borne in mind that the Feinberg Law is not a criminal statute (cf. *American Communications Association* v. *Douds, supra,* at pp. 412-413). The only result of the operation of the Feinberg Law is the possible "loss of a particular position," which, as this Court said in the last cited case (p. 409), "is not the loss of life or liberty."

But even in the *American Communications case,* where there is a criminal penalty for the making of a false oath, this Court said (339 U. S. at p. 412):

> "The argument as to vagueness stresses the breadth of such terms as 'affiliated,' 'supports' and 'illegal or unconstitutional methods.' There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

And in the *Dennis* case where the Smith Act, which is a criminal statute of course, was claimed to be vague, this Court said (341 U. S. at pp. 515, 516):

> "There remains to be discussed the question of vagueness—whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such vagueness contravenes the First and Fifth Amendments. * * *
>
> "We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. * * * We think it well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand. * * * Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the

scrupulous care demanded by our Constitution. But we are not convinced that *because there may be borderline cases at some time in the future*, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute." (emphasis supplied)

That a "borderline" or "peripheral" case (*Jordan* v. *DeGeorge*, 341 U. S. 223, at p. 232) may at some time arise which might present doubt as to whether a teacher had violated Section 3021 does not condemn the statute itself. No case is before the Court now and unconstitutional application of the law will not be presumed "while Courts sit" (see *American Communications Association* v. *Douds*, *supra*, at p. 410, quoting Mr. Justice Holmes in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223).

VI

Miscellaneous arguments which have been made in these litigations.

In the course of the three litigations involving the Feinberg Law, various other arguments were made as the cases moved through the State courts. The courts found the law not attackable on any of such grounds and indeed appellants in the instant appeal apparently agree for they do not make similar arguments here. However, we shall consider two of them very briefly in this Point.

A

Bill of Attainder

The Court of Appeals construing the Feinberg Law held that it "has none of the legal characteristics of a bill of attainder" (301 N. Y. at p. 493; R. 66). Its complete statement on this point was as follows:

"The appellants also contend that the Feinberg Law is a bill of attainder and that, as such, it violates section 9 of article I of the Federal Constitution. As a basis for that assertion the appellants note the facts, stated in the preamble of the statute *(supra)* as findings by the Legislature, that there is common report that members of subversive groups 'and particularly of the communist party' have infiltrated into public employment in the public schools of the State; that members of such groups frequently use their position to advocate and teach subversive doctrines, and in consequence that subversive propaganda can be disseminated among children in attendance at the public schools.

"A bill of attainder has been defined as '* * * a legislative act which inflicts punishment without a judicial trial.' *(Cummings* v. *Missouri,* 4 Wall. [U. S.] 277, 323.) By basing their argument upon excerpts from the preamble of the Feinberg Law appellants rely upon what is clearly a prefatory statement by which the Legislature has declared its purpose in adding new section 3022 to the Education Law. Such preamble enacts nothing, contains no directives and, as we have seen, is not made a part of the Education Law. *(Pumpelly* v. *Village of Owego,* 45 How. Prac. 219; 257.) Furthermore, a textual examination of the provisions of the Feinberg Law—section 3022—in the light of the above-quoted definition of a bill of attainder, discloses that no organization is named in the body of the act where are prescribed the steps to be taken by the Board of Regents in listing organizations which it finds to be subversive. The text also makes provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry. It is also clear that no punishment is inflicted upon any organization which the Board of Regents—after hearing—shall find advocates the overthrow of government by force or unlawful means. (Cf. *American Communications Assn.* v. *Douds, supra,* pp. 413-414). In the event such an organization is aggrieved by action taken by the Board of Regents under the statute, such action may be the subject of a

proceeding under article 78 of the Civil Practice Act. We are thus led to conclude that the Feinberg Law has none of the legal characteristics of a bill of attainder." (301 N. Y. at pp. 492-3)

The answers of this Court to the bill of attainder arguments in the *Garner* case and *American Communications* case are the definitive answer to any bill of attainder argument as to the Feinberg Law.

In the *Garner* case, Mr. Justice Clark said (341 U. S. at p. 722):

"We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

In the *American Communications* case, Chief Justice Vinson's opinion said as to the bill of attainder argument (339 U. S. at pp. 413-414):

"The unions' argument as to bill of attainder cites the familiar cases, United States v. Lovett, 328 U. S. 303, 90 L. Ed. 1252, 66 S. Ct. 1073 (1946); *Ex parte* Garland (U. S.) 4 Wall. 333, 18 L. Ed. 366 (1866); Cummings v. Missouri (U. S.) 4 Wall. 277, 18 L. Ed. 356 (1866). Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9(h) is intended to prevent future action rather than to punish past action." (emphasis by the Court)

B

The permissive provision in the statute allowing the use of material or evidence made available to the Board of Regents by Federal agencies.

The provision in the statute permitting the Board of Regents to utilize listings compiled by a Federal agency was probably not necessary. But it is, of course, merely a source of information to the Board of Regents in making its inquiry. Without this provision, the Board of Regents, an administrative body, would have been free to avail itself of such material in making its inquiry (e. g., *Long Island Lighting Co.* v. *Maltbie*, 176 Misc. 1, 5, aff'd, 262 App. Div. 376, aff'd, 287 N. Y. 691; *Matter of Long Beach Gas Co.* v. *Maltbie*, 264 App. Div. 496, 503, aff'd, 290 N. Y. 572; *Eagles* v. *Samuels* [1946], 329 U. S. 304, 313, 316). The courts upon judicial review will insure that the use made thereof does not violate the constitutional rights of those against whom it is used.

Moreover, the Board of Regents in their first hearing (further hearings having been stayed by the litigations) demonstrated the discriminating use that would be made of the Federal lists. They gave five organizations notice of hearing in order to reach a determination as to whether such organizations advocated the overthrow of the government by force, whereas there are some 160 or more on the Federal list compiled under the President's Executive Order.

Conclusion

"Freedom of expression is the well-spring of our civilization—the civilization we seek to maintain and further by recognizing the right * * * to put some limitation upon expression. Such are the paradoxes of life" (Mr. Justice Frankfurter in *Dennis* v. *United States, supra,* at p. 550).

It is not complacent indifference to any curtailment of freedom of action or expression but that vigilance which is the price of liberty, which compels, sometimes, the taking of measures, having perhaps the effect of causing individuals who hold or desire specific occupations, to pause in the exercise of certain of their guaranteed freedoms (cf. *Dennis* v. *United States, supra,* at p. 532; *American Communications Association* v. *Douds,* 339 U. S. at pp. 389, 333, 403-4).

It has been said that freedom dies with every individual and is not reborn with his successors but must be achieved anew, generation by generation. That is why those who would wipe out freedom regard "The Crucial Battle For The World's Youth"* as among the most important in their warfare, if not the most important.

They are fully aware that the adult of today still has his heritage, experience and love of freedom; that he soberly measures therewith the doctrines that the advocates and agents of violent overthrow of our government propound. Not so youth, with its enthusiasm, without that background or experience.

If when this generation is gone the one that rises to take its place will have been schooled by those who bear no

* In The New York Times Magazine section of November 18, 1951 appeared a most significant article so entitled by Barbara Ward, former foreign editor of The Economist of London, and a provocative British writer on world affairs.

"fidelity to the very presuppositions of our scheme of government," that government which "we seek to maintain and further" will vanish. And we will have done it by our own hand by having permitted our Constitution to become "a suicide pact" (*Terminiello* v. *Chicago*, 337 U. S. 1, 37, quoted in *American Communications Association* v. *Douds*, *supra*, p. 409), by having permitted it "to serve as a protecting screen for those who while claiming its privileges" (*Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 414) will have destroyed it.

The disciplined agents of organizations advocating the overthrow of our government by force and violence are not free to think or speak as they will (*supra*, point III). Those who may be teachers, any more than those who are labor leaders or who follow any other occupations. On the contrary, they are under compulsion not to speak truth, but only that which will lead or mislead into their fold. It is not academic freedom that would be protected by preventing their elimination from the schools. The freedom they would gain or retain is the freedom to influence children in their ways, with all the power of influence that a teacher wields by the mere fact that he is the teacher.

Academic freedom, freedom of speech, free expression of honest thought and belief of all complexions, can continue to flourish and to flourish in truth, only when teachers —if such there be—who have no "fidelity" to our government where men and women have this freedom, but who actually advocate its overthrow by force, are eliminated as teachers. That is all the Feinberg Law seeks to accomplish, providing the ensurance and protection of every element of due process.

The decision of the Court of Appeals of New York should be affirmed and the Feinberg Law declared to be in all respects constitutional.

December 12, 1951.

Respectfully submitted,

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Appendix

TEXT OF RELEVANT STATUTES

The Feinberg Law

(Chapter 360, Laws of 1949)

Section 1. The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate, and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to pro-

tect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

§ 2. Sections three thousand twenty-two, three thousand twenty-three and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby renumbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

§ 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible

for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description

of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

§ 4. The schedule of section headings of article sixty-one of such law is hereby amended to read as follows:

3022. Elimination of subversive persons from the public school system.
3023. Liability of a board of education, trustee or trustees.
3024. Teachers responsible for record books.
3025. Verification of school register.

§ 5. This act shall take effect July first, nineteen hundred forty-nine.

EDUCATION LAW

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

CIVIL SERVICE LAW

§ 12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or

any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or.

(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

EDUCATION LAW

"§ 310. *Appeals or petitions to commissioner of education and other proceedings.*

"Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever.* Such appeal or petition may be made in consequence of any action:

* * *

"7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

EDUCATION LAW

"§ 2573. *Appointment of assistant, district or other superintendents, teachers and other employees; their salaries, et cetera.*

"5. * * * Any person conceiving himself aggrieved may review the determination of said board either by an appeal to the commissioner of education, as provided for by article seven of this chapter, or in accordance with the provisions of article seven of this chapter, or in accordance with the provisions of article seventy-eight of the civil practice act. If such person elect to institute a proceeding under the civil practice act, the determination of such board shall, for the purpose of such proceeding, be deemed final. * * *"

* Notwithstanding this broad language, a determination of the Commissioner of Education will be reviewed and annulled by the Courts if found to be malicious or arbitrary. *Bullock* v. *Cooley*, 225 N. Y. 566, 577-578; *Matter of Fabricius* v. *Graves*, 174 Misc. 130, 133, affd. 260 App. Div. 981, appeal from unanimous affirmance dismissed on ground no constitutional question pre nt, 285 N. Y. 610.